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published in
Transnational Dispute Management
2009

document version
Peer reviewed version

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Transnational Dispute Management(2), 1-27

ISSN : 1875-4120
Issue : Vol. 7, issue 1
Published : April 2010

Transnational Dispute Management
www.transnational-dispute-management.com

Provisional Application of the Energy Charter Treaty: A Short Analysis of Article 45

by T. Gazzini

PROVISIONAL APPLICATION OF THE ENERGY CHARTER TREATY: A SHORT ANALYSIS OF ARTICLE 45

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This paper discusses the provisional application of the ECT under Article 45, with particular attention to three major cases currently pending against the Russian Federation. It makes four main points. First, paragraphs (1) and (2) of Article 45 function independently from each other. This means that Article 45 (1) can be invoked even if no declaration has been made under Article 45 (2) - as in the case of the Russian Federation. Second, the domestic law clause in Article 45 (1) can be invoked only if the relevant domestic legal instrument existed at the time of signature and is still in force. Having signed the ECT in 1994, the Russian Federation is prevented from invoking the 1995 Federal Law on international treaties for the purpose of Article 45 (1). Third, even assuming that the 1995 Federal Law could be invoked, it is not inconsistent with the provisional application of the ECT. Finally, Article 45 is a complex but sufficiently clear provision aimed at rapidly making the ECT applicable between signatories while accommodating the needs of recalcitrant members with a view to achieving the broadest possible participation.

I. Introduction

The Energy Charter Treaty (ECT) is a complex agreement of paramount importance for the promotion and protection of foreign investment in the energy sector [1]. Article 45, which provides for the provisional application of the ECT between signatories, deserves the closest scrutiny due to its uniqueness and the considerable practical consequences it may have.

So far, only one investment tribunal has rendered a decision on the provisional application of the ECT. In a dispute opposing a Greek investor to Georgia, it held that the respondent was legally obliged to apply the treaty on a provisional basis from the moment of signature, provided that such an application was not inconsistent with the domestic law of Georgia or Greece [2].

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[1] Available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf. In accordance with Article 38, the agreement was open for signature from 17 December 1994 to 16 June 1995.

[2] *Ioannis Kardassopoulos* v. *Georgia*, ICSID ARB/05/18, Decision on jurisdiction, 6 July 2007, available at http://ita.law.uvic.ca. For a comment see A. Hutcheon, J. Spencer, 'Provisional Application of the Energy

The decision is going to be tested in three major cases currently pending against the Russian Federation [3]. In all three cases, the Respondent has challenged the jurisdiction of the tribunal, presumably by denying that the ECT provisionally applies to the Russian Federation due to inconsistency with its domestic law and in particular the 1993 Constitution and Federal Law No. 101-FZ of 15 July 1995 on the International Treaties of the Russian Federation [4]. The tribunals, who are identically composed, have concluded the hearings and will deliver their decisions on jurisdiction in the next few months. While awaiting the decisions, this essay aims at analyzing Article 45 from the standpoint of the interpretation of treaties, making a reference when appropriate to the Russian Federation.

It must be recalled that the Russian Federation signed the ECT on 17 December 1994 without making any declaration under Article 45 (2). Since then, the Russian Federation openly expressed its unease with the treaty which is due primarily to "the dissatisfaction with the results of the ongoing negotiations on the ECT Transit Protocol and lack of initiative on the part of the Energy Charter Conference governing bodies with a view to developing a number of new protocols. In particular, it concerns a gas protocol, which would facilitate resolution of investment problems that producers face in connection with the gas market liberalisation policies it the West European countries" [5].

Last 30 July, eventually, the Russian Prime Minister signed the Government Ordinance N 1055-r providing for the notification to the Depositary about intention of the Russian Federation not to ratify the ECT and the Protocol on Energy Efficiency.

Charter Treaty', *The European & Middle Eastern Arbitration Review 2008*, available at http://www.globalarbitrationreview.com/reviews/3/the-european-middle-eastern-arbitration-review-2008.

[3] *Yukos Universal Ltd.* (UK – Isle of Man) v. *Russian Federation*; *Hulley Enterprises Ltd.* (Cyprus) v. *Russian Federation*; *Veteran Petroleum Trust* (Cyprus) v. *Russian Federation*. See S. Nappert, 'Russia and the Energy Charter Treaty: The Unplumbed Depths of Provisional Application' 6(1) *Transnational Dispute Management* (March 2008).

[4] In May 2008, the United Kingdom Select Committee on European Union stated that "it is thought that the Russian Federation will argue that it does not have to apply the Treaty due to the proviso contained in Article 45(1) of the Treaty that it should only be applied provisionally to the extent that domestic laws permits it to do so. The Russian Federation may also argue that, constitutionally, it is the Duma, not the Government that has the power to bind the Russian Federation", Session 2007-08, Written Evidence, Annex 2, at http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/98/98we09.htm.

[5] *Official Report of the Russian Federation on the Investment Climate and Market Structure in the Energy Sector*, Moscow 2004, at http://www.encharter.org/fileadmin/user_upload/document/Investment_-_Russia_-_2004_-_ENG.pdf. On 21 April 2009, the Russian Federation launched an initiative for a new universal treaty governing the global energy supply system, see *Conceptual Approach to the New Legal Framework for Energy Cooperation - Goals and Principles*, at http://www.kremlin.ru/eng/text/docs/2009/04/215305.shtml. On the reaction of the EU Energy Commissioner, see *EU rejects Russia proposal to replace Energy Charter*, http://www.eubusiness.com/news-eu/1241089322.03.

II. Interpretation of international treaties

Article 31 and 32 of the Vienna Convention on the law of treaties (VCLT) [6] consecrated to the interpretation of treaties reflect customary international law. They are conveniently relied upon by the International Court of Justice (ICJ) [7] and virtually all other international courts and tribunals [8] regardless to the ratification of the Vienna Convention by the States concerned. This view has also consistently been shared by investment tribunals. In *Saluka* v. *Czech Republic*, for instance, the Tribunal pointed out that the relevant BIT was to be interpreted

> in accordance with the rules of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties. These rules are binding upon the Contracting Parties to the Treaty, and also represent customary international law [9].

Under Article 31, a treaty must be interpreted in accordance with the ordinary meaning of its terms in their context and in the light of the object and purpose of the treaty. Although it "must be based above all upon the text of the treaty" [10], interpretation is a "holistic exercise that should not be mechanically subdivided into

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[6] Done at Vienna on 2 3 May 1969. Entered into force on 27 January 1980, *United Nations Treaty Series*, vol. 1155, p. 331. Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[7] See, in particular, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, 26 February 2007, *I.C.J. Reports 2007*, para 160; *Case Concerning the Dispute Regarding Navigational and Related Rights*, Judgment, 13 July 2009, http://www.icj-cij.org/docket/files/133/15321.pdf, para 47.

[8] See, for instance, WTO Appellate Body (*United States - Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 20 May 1996, WT/DS2/AB/R, p. 104); Arbitral tribunal, *Iron Rhine* (Belgium – Netherlands), Award, 24 May 2005, para 45.

[9] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 296. For some other examples, see: *Mondev International Ltd. v. United States*, ICSID ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para. 43; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID ARB/02/13, Jurisdiction, 9 November 2004, para 75; *Plama Consortium Limited v. Bulgaria*, ICSID ARB/03/24 (Energy Charter Treaty), Jurisdiction, 8 February 2005, p. 117; *Methanex Corp*. v. *United States*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part II, Chapter B, para 15.

[10] *Sovereignty over Pulau Litigan and Pulau Sipadan* (Merits), *I.C.J. Reports 2002*, para 37. The United Nations International Law Commission (ILC), in turn, has pointed out that "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intention of the parties", 18 *Yearbook ILC* (1966-II), p. 221. In *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para 114, the WTO Appellate Body observed that "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted".

rigid components" [11]. The different elements of Article 31 are ordered as "a logical progression" [12]. An ICSID Tribunal has aptly observed that

> [i]nterpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation [13].

III. Relationship between Article 45 (1) and Article 45 (2)

Article 45 is rather a complex provision located in Part VIII (Final provisions) immediately after the article on the entry into force, according to which the ECT would have entered into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession [14].

It is composed of 7 paragraphs totalling more than 500 words. Its length and complexity immediately reveals the importance attached to this provision which reads in part:

> (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
>
> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
>
> (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
>
> (c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.
>
> (3) (a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting

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[11] It must be emphasised that Article 31 establishes a single rule, as it is evident from its title, see, for instance, WTO Appellate Body *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, 12 September 2005, para 176. According to I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), p. 153, "[i]nterpretation is a process involving the deployment of analytical and other skills: it cannot be reduced to a few propositions capable of purely automatic application in all circumstances".

[12] A. Aust, *Modern Treaty Law and Practice*, 2nd ed. (Cambridge: Cambridge University Press, 2007), p. 234.

[13] *Aguas del Tunari S.A. v. Bolivia*, ICSID ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para 91.

[14] The ECT entered into force on 16 April 1998.

> Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.
>
> (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).
>
> (c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefore [15].

It is appropriate to begin the analysis of Article 45 by discussing the relationship between its first two paragraphs. As shown below, this is a central question which determines (a) whether the signatories that have made no declaration under Article 45 (2) – currently the Russian Federation and Belarus – may still invoke the domestic law clause under Article 45 (1); and (b) whether the signatories that have made such a declaration but have not ratified the Charter yet – currently Australia, Iceland and Norway – need to demonstrate that they do not accept the provisional application of the treaty due to its inconsistency with domestic law [16].

Two views have been expressed in this regard. In *Kardassopoulos* v. *Georgia*, the Tribunal held that the domestic law clause contained in Article 45 (1) and the opting out mechanism provided for in Article 45 (2) function independently. It treated Article 45 (1) as containing a built-in domestic exception allowing a signatory not to apply the treaty on a provisional basis due to inconsistency with its domestic law, without any declaration being necessary. Article 45 (2), in turn, was interpreted as permitting a signatory to avoid the provisional application of the treaty for reasons not necessarily related to its domestic law. In this case a formal declaration is required.

The Tribunal thus rejected the argument that the Respondent was prevented from invoking the domestic law clause under Article 45 (1) since it had made no declaration under Article 45 (2) at the time of signature. In the words of the Tribunal

> [t]here is no necessary link between paragraphs (1) and (2) of Article 45. A declaration made under paragraph (2) may be, but does not have to be, motivated by an inconsistency between provisional application and something in the State's domestic law; there may be other reasons which prompt a State to make such a declaration. Equally, a State whose situation is characterised by such inconsistency is entitled to

[15] Subparagraph 45 (3) (c) has ceased to apply since all States that availed themselves of it upon signature, which were listed in Annex PA, have ratified the ECT. Paragraphs 4 to 6 deal with institutional and administrative matters and do not need to be discussed for the purpose of this paper. Paragraph 7 extends the application of Article 45 to States or Regional Economic Integration Organization that acceded to the ECT in accordance with Article 41 before its entry into force.

[16] See also below text note 31.

> rely on the proviso to paragraph (1) without the need to make, in addition, a declaration under paragraph (2). The Tribunal is therefore unable to read into the failure of either State to make a declaration of the kind referred to in Article 45(2) any implication that it therefore acknowledges that there is no inconsistency between provisional application and its domestic law [17].

The opposite view has been taken by Professor Reisman according to whom the two paragraphs must be interpreted and applied jointly. From this perspective, the words "not able" used in Article 45 (2) and the expression "to the extent" clause contained in Article 45 (1) introduce a qualified legal power to be exercised exclusively in case of inability to provisionally apply the treaty due to inconsistency with domestic law. The author also emphasises that the word "able" means inability rather political inconvenience and further argues that this conclusion becomes inexorable if the domestic law clause is struck from Article 45 (1).

He therefore excludes that Article 45 (2) allows a signatory to exempt itself from the provisionally application of the treaty on political grounds. In his words

> no declaration is referred to in Article 45 (1), indicating, first, that the "to the extent" clause in Article 45 (1) refers to the declaration contemplated in Article 45 (2) and, second, that it relates to an inability arising from domestic law and not to any undefined and unlimited political objection [18].

The literal argument based on the word "able" is quite strong, especially considering that the equally authentic French, Spanish and Italian texts of the treaty read respectively "[le signataire] n'est pas en mesure d'accepter", "imposibilidad [de un signatario] de aceptar" and "[il firmatario] non puó accettare" [19].

The argument based on the striking of the domestic law clause, however, is not convincing being based on the interpretation of the text as it could have been but it is not. Without the domestic law clause in Article 45 (1), Article 45 (1) and Article 45 (2) could hardly be construed independently. Yet, the very inclusion of the clause in Article 45 (1) has the opposite effect and makes such a construction possible.

It is also submitted that neither inference in the passage quoted above is compelling. First, Article 45 (2) is a typical binary clause: either the treaty applies entirely or does not apply at all (without prejudice to Article 45 (2) (c)). This is not necessarily the case of Article 45 (1). It is at least plausible to read the expression "to the extent" used in Article 45 as implying the possibility of provisional application of part – but not necessarily the whole – of the treaty, depending on the *extent* the provisional application of the treaty is compatible with the constitution, laws or regulations of

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[17] Para 228.

[18] W. M. Reisman, 'The Provisional Application of the Energy Charter Treaty', in G. Coop, C. Ribeiro (eds.), *Investment Protection and the Energy Charter Treaty* (Huntington, NY: Juris Publishing, 2008), p. 47, p. 57. See also M. Belz, 'Provisional Application of the Energy Charter Treaty: *Kardassopoulos* v. *Georgia* and Improving Provisional Application in Multilateral Treaties', 22 *Emory International Law Review* (2008) 727, p. 742 ff.

[19] According to Article 50, the treaty has been concluded in English, French, German, Italian, Russian and Spanish, all texts being equally authentic.

the concerned signatory. As a matter of treaty drafting, the word "unless" or the expressions "provided that" or "except when" would have clearly conveyed the idea that the treaty *as a whole* was meant to be applied on a provisional basis [20].

This interpretation is supported by the French, German and Italian versions of the treaty, which employ, respectively the expressions "dans la mesure où", "in dem Masse", and "nei limiti in cui". The domestic law of a signatory, for instance, may allow the provisional application of the substantive provisions of a treaty while precluding it with regard to the provisions on the settlement of disputes. Interestingly, according to Article 23 (1) of Federal Law No. 101-FZ, an international treaty *or a part thereof* can be provisionally applied to the Russian Federation.

Second, the argument that the first two paragraphs of Article 45 both refer to the inability to provisionally apply the treaty due to domestic law is not entirely convincing. Assuming this had been the intention of the parties, at least two options would have been available to them to express such an intention in a clear text.

Paragraph 1 would have read

> Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations. Any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

Alternatively, the first sentence of Article 45 (2) would have read

> [In accordance with paragraph (1)] [a]ny signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application under paragraph 1.

Quite the contrary, the expression "notwithstanding paragraph 1" opens paragraph 2. Far from being casual or due to poor drafting, the use of this expression demonstrates that the two paragraphs are related but independent as held in *Kardassopoulos* v. *Georgia*. The ordinary meaning of "notwithstanding" is "[i]n spite of" or "without regard to". The French, German, Italian and Spanish versions of the treaty, using respectively "nonobstant", "ungeachtet", "fatto salvo" and "no obstante", point in the same direction. Without such an expression, the argument that that the declaration under Article 45 (2) concerns the domestic law clause

[20] This view has apparently been maintained by the British Government precisely with regard to the Russian Federation. In its words, "The Russian Federation has not ratified the Treaty but has agreed to provisional application in accordance with Article 45 of the Treaty. This places *some* obligations on the Russia Federation, but *only to the extent* that such provisional application is not inconsistent with its constitution, laws or regulations", *Hansard*, 7 Feb 2006: Column 1045-6W, available at http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060207/text/60207w03.htm (Italics added). But see *Kardassopoulos* v. *Georgia*, para 210, where the Tribunal held that Article 45 (1) provides for the application of the treaty "as a whole".

contained in Article 45 (1) would have been more than plausible. With such an expression, the argument is untenable [21].

Paragraph 2 can be construed as an exception to the obligation imposed in paragraph 1 to apply the treaty on a provisionally basis to the extent this is permitted under domestic law. This point is developed below. For the time being, it is noteworthy that the WTO Appellate Body, heavily relying on the word "notwithstanding", held that the so-called Enabling Clause amounts to an exception to the most-favoured nation treatment under Article 1:1 GATT 1994. In the words of the Appellate Body

> by using the word "notwithstanding", paragraph 1 of the Enabling Clause permits Members to provide "differential and more favourable treatment to developing countries "in spite of" the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO "immediately and unconditionally". Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an "exception" to Article I:1 [22].

It may be concluded that the view that the domestic law clause under Article 45 (1) and the opting out mechanism under Article (2) function independently from each other – as held yet not demonstrated in *Kardassopoulos* v. *Georgia* – is to be preferred. Although the use of the words "not able" in Article 45 (2) may militate against the non application on provisional basis of the ECT on grounds other than inconsistency with domestic law, other textual arguments are more compelling. The text and structure of the fist two paragraphs of Article 45, and in particular the use of "notwithstanding paragraph 1" which opens Article 45 (2), demonstrate that Article 45 (2) introduces a possibility of avoiding the provisional application of the treaty distinct from that provided for in Article 45 (1).

IV. Provisional application of the ECT under Article 45 (1)

According to Article 45 (1) the signatories of the ECT agreed to provisionally apply the treaty to the extent there is no incompatibility with their domestic law.

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[21] G.G. Fitzmaurice notes that "[i]t is always a useful exercise when the interpretation of a given provision in the context of a whole instrument is in question, to consider what difference it would make if that provision did not figure in the instrument at all", *Certain Expenses of the United Nations (Art. 27, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, *I.C.J. Rep. 1962*, p. 151, at p. 207. The reasoning may apply to an expression used in a provision.

[22] *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body Report, WT/DS246/AB/R, 7 April 2004, para 90 (footnotes omitted). On this point the Appellate Body upheld the conclusion reached in the Panel Report, para. 7.44. In *Methanex v. United States,* UNCITRAL (NAFTA), Final Award, 3 August 2005, the Tribunal declared that it remained in principle "open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant", Part II - Chapter B, para 6. See also *Continental Casualty Company v. Argentina,* ICSID ARB/03/9, Award, 5 September 2008, paras 192 ff.

Article 45 (1) is fully consistent with both Articles 25 VCLT (Provisional Application) and 27 (Internal law and observance of treaties) VCLT. Under Article 25, as well as under customary international law, contracting parties may agree on the complete or partial application of a treaty on a provisional basis [23]. Nothing prevents them from making such a provisional application dependent on its compatibility with their domestic laws.

If it is accepted that the expression "to the extent" used in Article 45 (1) permits the provisional application of the treaty as a whole or in part, furthermore, the application of the treaty could vary between signatories depending on their domestic laws. Although Article 45 (1) – unlike Article 45 (2) – does not contain any reciprocity clause, it is well established in treaty law that a treaty applies between two contracting parties to the extent *both* are bound to it.

Under Article 27 VCLT, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Article 27 VCLT codifies customary international law and obviously applies to the obligations stemming from the provisional application of the ECT. The domestic clause in Article 45 (1) is in no way in contradiction with Article 27 VCLT as it expressly makes the provisional application of the treaty dependent on its compatibility with the domestic laws of signatories. As a result, by invoking the domestic law clause a signatory does not attempt to justify non-compliance with any international obligations: it simply claims that it is not bound by the treaty.

In the case of the Russian Federation, the Constitution is silent on the issue of provisional application of treaties and can hardly be invoked for the purpose of Article 45 (1) ECT. Furthermore, before the adoption of Federal Law No. 101-FZ it was not entirely clear which categories of treaties required ratification [24]. To challenge the provisional application of the ECT, therefore, the Russian Federation may rely on Federal Law No. 101-FZ whose Article 23 regulates the provisional application of international treaties.

It can be argued, however, that Article 27 VCLT – alongside with the principle of good faith existing under customary international law and reiterated in Article 26 VCLT – limits the domestic law clause under Article 45 (1) to the domestic law *existing* at the time of signature. Otherwise, the signatory could escape compliance

[23] Article 25 reads: "1. A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty".

[24] Interestingly, Article 87 of the Draft Constitution indicated the categories of treaties which required the consent of the legislature. The list included "general economic treaties", see G.M. Danielenko, 'The New Russian Constitution and International Law', 88 *Am. Jour. Int. Law* (1988) 451, p. 454 and note 22. This category does not appear in Article 15 of Federal Law No. 101-FZ on the treaties that are subject to ratification.

with the international obligations it accepted at the time of signature by subsequently revising its constitution or enacting a piece of legislation or a regulation. Such a conclusion is strengthened by the broad definition of domestic law adopted by Article 45 (1) [25]. It follows that the Russian Federation, having signed the ECT on 17 December 1994, could not invoke Federal Law No. 101-FZ of 15 July 1995 to challenge the provisional application of the treaty.

Even assuming for the sake of the argument that the Russian Federation is not precluded from invoking Federal Law No. 101-FZ, there is no compelling argument in this piece of legislation against the provisional application of the ECT. Under Article 23 (2), the decision on the provisional application of an international treaty or a part thereof is taken by the governmental body signing the treaty in accordance with Article 11 of the same law. The decision is then submitted for ratification to the Duma within six months from the date of the beginning of the provisional application.

According to Federal Law No. 101-FZ, therefore, a treaty can be provisionally applied upon signature by the competent governmental authority. This is demonstrated by two facts. First, if the State Duma refuses to ratify a treaty submitted in accordance with Article 23 Federal Law No. 101-FZ, the provisional application of the treaty ceases from the date of refusal [26]. Second, the Duma may extend the period of provisional application of the treaty through the adoption of a federal law.

However, Article 23 (2) takes it for granted that the treaty is timely submitted to the Duma and that a decision is adopted on the ratification of the treaty or the extension of its provisional application. It does not state what happens if the treaty is submitted late – or it is not submitted at all – or if no decision is taken by the Duma.

The ECT was submitted to the State Duma on 26 August 1996 [27] – well after the expiring of the six-month period – and no decision has been adopted since. Neither the late submission of the treaty nor the lack of any decision on behalf of the State Duma affects the provisional application of the ECT. It appears that according to the Commentary to Federal Law No. 101-FZ, "the failure to submit the treaty within the six-month period would not automatically terminate the temporary application thereof", whereas "if a treaty is submitted to the State Duma within the six-month period and the Duma fails to consider the matter, the temporary application of the treaty continues" [28].

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[25] It also submitted that the domestic law clause under Article 45 (1) can be invoked as long as the relevant constitutional provisions, laws or regulations are still in force or, in the case of the settlement of disputes, were in force at the time of the alleged violations of the treaty.

[26] See W.E. Butler, *The Law of Treaty in Russia and in the Commonwealth of Independent States* (Cambridge: Cambridge University Press, 2002), p. 130.

[27] *Official Report*, above n. 5, p. 3.

[28] W.E. Butler, above n. 26, p. 130.

A final point must be made as to the functioning of Article 45 (1). Unlike Article 45 (2) this provision does not foresee any declaration on behalf of the concerned signatory. This raises the question whether signatories need to declare at the time of signature to what extent their domestic law prevents them from provisionally apply the ECT, or whether they can invoke the domestic law clause at a later stage [29]. In the absence of an express obligation in this sense the right to invoke the domestic law clause can hardly depend on a declaration rendered at the time of signature. This conclusion is further supported by a practical consideration. A declaration under Article 45 (1) may have required a careful and possibly time-consuming examination of domestic law by each signatory [30]. This would have run against the desire to have the ECT rapidly applicable on a provisional basis.

V. Opting out mechanism under Article 45 (2)

Article 45 (2) is composed of three subparagraphs permitting a signatory to opt out from the provisional application of the ECT. Under Article 45 (2) (a), a signatory may exempt itself from the obligation contained in Article 45 (1) through a declaration to the Depositary that it is not able to provisionally apply the ECT. The declaration does not necessarily need to be related to domestic law, as held in *Kardassopoulos* v. *Georgia*.

It is worth noting that none of the declarations under Article 45 (2) currently valid contain any reference to domestic law or any motivation. Furthermore, whereas Iceland has declared that it is not able to accept the provisional application of the treaty, Australia and Norway have merely declared that they do not accept it [31].

Article 45 (2) (b) clarifies that a signatory which has made a declaration in accordance with Article 45 (2) (a) and its investors are not entitled to the benefits of the provisional application. This is the logical consequence, based on the principle of reciprocity, of the exemption from the provisional application. As long as the signatory maintains the declaration under Article 45 (2) (a) the treaty is not applicable to it (subject to Article 45 (2) (c) below). Should the declaration be withdrawn – as foreseen in Article 45 (2) (b) *in fine* – the treaty would be provisionally applicable to the signatory under and within the limits of Article 45 (1).

Article 45 (2) (c) limits the opting out mechanism by excluding its functioning with respect to Part VII (Structure and institutions). Significantly, this subparagraph contains a domestic law clause. The clause is not indispensable since the exclusion of Part VII from the opting out mechanism implies the provisional application of this part in accordance with Article 45 (1). It is nonetheless entirely compatible with the

[29] T. Wälde, *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, (The Hague: Kluwer, 1996), p. 601.

[30] Establishing whether provisional application is consistent with domestic law may be a difficult exercise as demonstrated by the conflicting experts' opinions concerning Georgian and Greek law referred to in *Kardassopoulos* v. *Georgia*, paras 230 and 240.

[31] On file with author.

construction of the relationship between Article 45 (1) and Article 45 (2) adopted above.

The coordination of Article 45 (2) (b) and Article 45 (2) (c), however, is not unambiguous. Under the first subparagraph, a signatory availing itself of the opting out mechanism is prevented from benefitting from the provisional application of the ECT. The second subparagraph brings the provisional application of Part VII out of the reach of the opting out system – without prejudice to the domestic law clause. As a result, the signatory is entitled to benefit from its participation to Part VII, for instance by participating to the meeting and sharing the responsibility of the Energy Charter Conference. The ambiguity would have been avoided by adding at the end of Article 45 (2) (b) "without prejudice to subparagraph (c)", or by including "subparagraph (b)" in the "notwithstanding" expression used in Article 45 (2) (c).

VI. Termination of the provisional application under Article 45 (3)

According to Article 45 (3) (a), a signatory may terminate the provisional application of the ECT by notifying the Depository its intention not to ratify the treaty. Termination takes effect 60 days after notification. Under Article 45 (3) (b), however, Parts III (Investment promotion and protection) and V (Settlement of disputes) continue to apply for 20 years from the date of termination with respect to investments made before or during the period of provisional application. Article 45 (3) (b) is reminiscent of bilateral investment treaties which almost systematically extend the effects of the treaty in case of termination by one of the contracting parties for a period which normally ranges between 10 and 20 years. This is perfectly consistent with Article 25 VCLT which leaves the parties the widest freedom as to the consequences of the termination of provisional application.

The notification by the Russian Federation of the intention not to ratify the treaty, as recently announced, would bring the termination of the provisional application at the expiring of the 60 day period. However, the treaty would continue to apply for 20 years with regard to existing investments.

VII. Contextual considerations: Article 1 (6)

In *Kardassopoulos* v. *Georgia*, the Respondent challenged the Tribunal jurisdiction by arguing *inter alia* that according to Article 1 (6) the Tribunal has jurisdiction only over investment made existing at or made after the entry into force of the treaty under Article 44 [32]. Article 6 (1) reads in part:

> A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date")

[32] Above n. 2, para 72.

> provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

The Tribunal held that although provisional application is not equivalent to entry into force, the effective date for the purpose of Article 1 (6) was the date the treaty started to be provisionally applicable under Article 45 (1). In a passage reminiscent of the principle of effectiveness, the Tribunal noted that

> were "entry into force" in Article 1(6) to mean only definitive entry into force under Article 44 of the ECT, the effect would be to make the "Effective Date" in Article 1(6) the date of definitive entry into force which would mean that "matters affecting ... Investments" before the date of entry into force, i.e., during the period of provisional application, would be excluded from the scope of the ECT: such a result would strike at the heart of the clearly intended provisional application regime [33].

The Tribunal conclusion is correct although the effectiveness principle becomes really decisive in combination with a textual consideration. As mentioned above, according to Article 45 (3) (b) in case of termination of the provisional application, the obligations under Parts III and V of the treaty *remain* in effect for twenty years with regard to existing investments. In other words, these foreign investments *continue* to enjoy the legal protection under Parts III and V of the treaty. This provision clearly demonstrates that the treaty was meant to legally protect foreign investment upon signature [34].

VIII. Object and purpose of the ECT and Article 45

Although it is submitted that the literal analysis of Article 45 carried out in the proceeding sections permits to elucidated with sufficient clarity the provisional application of the ECT, it is appropriate to consider the object and purpose of the treaty in general and of Article 45 in particular [35].

Significantly, the preamble of the treaty proclaims the intention of the contracting parties

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[33] Para 222. In *Wintershall Aktiengesellschaft v. Argentina*, ICSID ARB/04/14, Award, 8 December 2008, para 165, the Tribunal held that "[n]othing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning".

[34] It remains that the definition of investment in Article 1 (6) should have included investment existing at or made after the date in which the treaty started to be applies on a provisional basis.

[35] As held by the WTO Appellate Body in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, 12 Sept 2005, WT/DS269/AB/R, para 238, it is not necessary "to divorce a treaty's object and purpose from the object and purpose of specific treaty provisions, or vice versa. To the extent that one can speak of the "object and purpose of a treaty provision", it will be informed by, and will be in consonance with, the object and purpose of the entire treaty of which it is but a component". Investment arbitral tribunals have often considered the object and purpose of single treaty provisions. In *Tokios Tokelés v. Ukraine*, ICSID ARB/02/18, Jurisdiction, 29 April 2004, for instance, the Tribunal referred to the object and purpose of ICSID Convention (paras 31-32, 38, 46, 77, 85, 86) as well as the purpose (or the purpose and the object) of some of its provisions, in particular Article 1(2)(c) (para 30); Article 25(2)(b) (paras 25, 46 and 49); Article 27 (para 60).

> [t]o implement and broaden their co-operation *as soon as possible* by negotiating in good faith an Energy Charter Treaty and Protocols, and desiring to place the commitments contained in that Charter on a secure and binding international legal basis [36].

From this perspective, the provisional application of the treaty upon signature represented the best way to achieve a "secure and binding international legal basis" to the commitments of the treaty. As comfortably held in *Kardassopoulos* v. *Georgia*, Article 45, far from being aspiration in character as maintained by Georgia [37], expresses the agreement of the parties as "a matter of legal obligation" [38].

Article 45 strikes a delicate balance between different needs. On the one hand, it provides an adequate legal protection to foreign investment and ensures – through the twenty–year period application of Parts III and V under Article 45 (3) (b) – that investment existing at the time of signature or made during the period of provisional application are not exposed to an abrupt termination of the legal protection of the ECT.

On the other hand, considering the magnitude of the commitments assumed by signatories through the provisional application of the treaty, it contains three devices intended to protect the sovereignty of signatories. The first device, available to all signatories without any declaration being necessary, is the domestic law clause contained in Article 45 (1). The clause is entirely justified considering that signature depended on a decision of the Executive and could have brought about considerable consequences in a highly sensitive sector such as the energy sector.

The second devise is the exemption from the provisional application of the treaty – apart from Part VII – which any signatory could have obtained upon signature through a declaration under Article 45 (2) (a).

A third devise is offered in Article 45 (2) (c) according to which a signatory could have accepted the provisional application of the treaty but, in derogation of Article 45 (2) (b), reserved itself the right to terminate it without being bound to apply Parts III and V for twenty years with respect to existing investment [39].

As a result, a signatory of the ECT had three options with respect to the provisional application of the treaty. It could have accepted the provisional application

1) of the treaty to the extent it was consistent with its domestic law in accordance with Article 45 (1) and subject to the termination clause included in Article 45 (2) (a) and (b);

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[36] Italics added.

[37] See, in particular, para 76 of the decision, above n. 2.

[38] Para 209.

[39] This subparagraph has ceased to apply, see above footnote 15.

2) of the treaty in accordance with Article 45 (1) but with a derogation as to the twenty year period of application in case of termination as foreseen in Article 45 (2) (b); or

3) of Part VII only and to the extent it was consistent with its domestic law by means of a declaration under Article 45 (2) (a).

First and foremost, Article 45 was meant to ensure the immediate provisional application of the treaty while providing for an adequate protection of the sovereignty of signatories through the domestic law clause. Most of the signatories, indeed, were prepared to immediately protect their respective investors under option 1) without having to go through the time-consuming and politically risky ratification process. This protection included a termination clause modelled after the termination clause of the treaty itself and virtually all bilateral investment treaties. Driven by the desire to ensure the broadest participation to the treaty, however, the negotiating parties introduced in Article 45 some flexibility through options 2) and 3), the later fixing the minimum level of participation to treaty required to signatories.

IX. Conclusions

The complexity of Article 45 reveals a carefully negotiated compromise aimed at ensuring the provisional application of the treaty upon signature while achieving the broadest participation in the treaty by safeguarding the sovereignty of signatories, primarily through the domestic law clause contained in Article 45 (1) and the opting out mechanism provided for in Article 45 (2). The two devices function independently as held – without providing a full explanation – in *Kardassopoulos* v. *Georgia*. The finding is important as signatories that have made no declaration under Article 45 (2) may still invoke the domestic law clause under Article 45 (1). This is the case of the Russian Federation.

Under Article 45 (1), a signatory may invoke its domestic law in order to exclude – or, arguably, limit – the provisional application of the treaty without any declaration at the time of signature being necessary. This is entirely consistent with the relevant articles of the VCLT and Article 27 in particular, provided that domestic law *existed* at the time of signature. Otherwise, the signatory could escape compliance with the international obligations it accepted at the time of signature by subsequently changing its domestic law. This means that the Russian Federation can hardly invoke its domestic law to challenge the provisional application of the treaty since its constitution is silent on the issue whereas the federal law on international treaties was adopted several months after the signature of the ECT.

Additionally, under Article 45 (2), a signatory may exempt itself from the provisional application of the treaty through a declaration under Article 45 (2) rendered at the time of signature. Such a declaration does not necessarily need to refer to the

domestic law of the concerned signatory nor does it affect the provisional application, subject to the domestic law clause, of Part VII of the treaty.

The provisional application of the treaty can be terminated by written notification, with effect at the expiration of a sixty day period. The treaty nonetheless continues to apply for twenty years with respect to investments made before or during the provisional period unless the concerned signatory has declared otherwise at the time of signature. It is within these limits that the Russian Federation could terminate the provisional application of the ECT as announced in July 2009.